87-1310

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED

A county tax assessor systematically arrives at the assessed value of property subject to recent sale by relying exclusively on the sales price, without adjusting the assessment of unsold comparable properties to that value. The result is that property subject to recent sale is assessed and taxed at a level as much as *6,500 percent higher* than properties stipulated and found to be comparable in every pertinent respect.

1. Did the court below err in holding that the discriminatory taxation resulting from this policy—known as the "welcome stranger" approach—did not violate the guarantee of equal protection in the Fourteenth Amendment to the United States Constitution?

2. Did the court below err in denying taxpayers subject to this discriminatory treatment any reduction in the assessment of their property, on the ground that they should instead seek to raise the assessments of all other comparable properties in the county, contrary to the holdings of this Court in *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), and other cases?

PARTIES TO THE PROCEEDINGS

Petitioners before this Court, appellees before the West Virginia Supreme Court of Appeals, and petitioners before the Webster County Circuit Court are East Kentucky Energy Corporation, Oneida Coal Company, Inc., and Shamrock Coal Company, Inc. East Kentucky Energy Corporation is a wholly-owned subsidiary of Shell Oil Company. Oneida Coal Company, Inc., and Shamrock Coal Company, Inc., are both wholly-owned subsidiaries of Sun Company Inc. Pursuant to Supreme Court Rule 28.1, a list of parents, subsidiaries, and affiliates of petitioners appears at Appendix J.

Allegheny-Pittsburgh Coal Company was also an appellee below and petitioner before the Circuit Court. We have been advised that Allegheny-Pittsburgh intends to seek review in this Court of the judgment below. Respondent County Commission of Webster County is the official entity that confirmed the challenged assessment of petitioners' property.

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v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioners East Kentucky Energy Corporation ("East Kentucky Energy"), Oneida Coal Company, Inc. ("Oneida"), and Shamrock Coal Company, Inc. ("Shamrock") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the West Virginia Supreme Court of Appeals entered in the above-entitled proceeding on July 17, 1987.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at —— W. Va. ——, 360 S.E.2d 560, and is reprinted in the appendix hereto ("App.") at 1a. That opinion considered certain orders and opinions of the Circuit Court of Webster County (Cline, J.), consolidated for purposes of appeal. Those orders and opinions, some of which contain large portions of verbatim language, are unreported and are reprinted at App. 15a, 49a, 79a, 83a, and 86a.

JURISDICTION

Petitioner East Kentucky Energy challenged the assessment of its real property in Webster County, West Virginia, for the years 1984-1986. Petitioner Oneida and its predecessor Shamrock challenged the assessment of its real property in Webster County for the years 1981-1986. In each instance the County Commission, sitting as a Board of Equalization and Review, sustained the assessments, App. 90a, and petitioners appealed to the Circuit Court of Webster County. By order entered November 22, 1985, the Circuit Court overturned the assessments of East Kentucky Energy for 1984-1985. App. 15a. By order entered February 13, 1986, the Circuit Court overturned the assessments of Oneida and its predecessor Shamrock for 1981-1985. App. 49a. By separate orders entered March 21, 1986, the Circuit Court overturned the 1986 assessments of both East Kentucky Energy and Oneida. App. 83a, 86a.

The County Commission appealed all the orders, and the appeals were consolidated. On July 17, 1987, the Supreme Court of Appeals reversed the Circuit Court in a per curiam opinion that indicated Justice Brotherton's dissent. App. 1a. A timely petition for rehearing was filed on August 13, 1987. On September 18, 1987, Justice Brotherton filed a dissenting opinion, which was now joined by Justice Neely, making the final vote to reverse 3-2. App. 11a. The petition for rehearing was denied on November 10, 1987. App. 14a. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

STATEMENT OF THE CASE

West Virginia, like 39 other States and thousands of local governments throughout the country, imposes an *ad valorem* tax on the ownership of real property within its jurisdiction. Since the amount of the tax levied is based on the value of the property, it is necessary to ascertain the value of the different parcels of property owned in the State. In West Virginia and many other jurisdictions responsibility for that task rests, in the first instance, with the county assessor.

Once the county assessor establishes the actual value of the particular parcels of property—the "appraised value"—he applies an appropriate percentage—50 percent in West Virginia—to arrive at the "assessed value." [1] The tax is then levied as a percentage of the assessed value of the property. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. The unconstitutional discrimination found by the Circuit Court and the two dissenters in the West Virginia Supreme Court of Appeals resides in the initial determination of the value of the property. The property owned by petitioners was appraised—and therefore assessed and taxed—at a dramatically higher level than property owned by others that was comparable in every respect.

Petitioner East Kentucky Energy owns 7,374 acres of property in Webster County, West Virginia. Petitioner Oneida owns some 7,783 acres of property in Webster County previously owned by its sister corporation, petitioner Shamrock. East Kentucky Energy purchased its property from Allegheny-Pittsburgh Coal Company in 1982 for some $30 million. Shamrock purchased the Oneida-Shamrock property in 1977 for some $5.9 mil-

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[1] The 50 percent figure was mandated by state law until 1981, when it was raised to 60 percent. Throughout this litigation, however, the assessor has used the 50 percent figure.

lion. The tax assessor for Webster County relied exclusively upon these purchase prices in arriving at the appraised value of petitioners' property for the years at issue, and then took 50 percent of the appraised value to arrive at the assessed value. East Kentucky Energy's property was thus taxed on the basis of an assessed value of some $15 million, and Oneida-Shamrock's on the basis of an assessed value of some $3 million. App. 3a-4a.

While the assessor thus raised the assessments of petitioners' property to reflect current market value, based on the sales prices, he did not similarly raise the assessments of other comparable property in Webster County. So long as the property was not subject to recent sale, it was carried on the tax books with the same assessment it had borne in prior years, with only occasional *de minimis* adjustments. App. 6a, 27a-28a, 58a. As a result of this assessment system, recently-conveyed property was assessed on the basis of its actual current value, while other comparable property—with the *same* actual value—was assessed, and therefore taxed, at a much lower level.[2]

Petitioners sought review of their assessments in the Webster County Circuit Court "on the grounds that the assessments violated the equal and uniform clause of article X, section 1 of the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." App. 4a. The facts stipulated by the parties, or established by findings of the Circuit Court undisturbed on appeal, highlight the

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[2] This assessment practice has been referred to as the "welcome stranger" approach. *See, e.g.*, Comment, *Hellerstein v. Assessor of the Town of Islip: A Response to Inequities in Real Property Assessments in New York*, 27 Syracuse L. Rev. 1045, 1061 (1976) ("newly-acquired parcels, although they may be equivalent in value to the long-held parcels, are assessed for a higher amount due to appreciation of land values. The 'new' owner—the 'stranger'—will pay higher taxes proportionately than the owner of a long-held parcel who 'welcomes' the fact that he consequently pays lower taxes").

dramatic disparity between the valuation of petitioners' property and that of comparable property owned by other taxpayers in Webster County.

With respect to the property owned by East Kentucky Energy, the Circuit Court concluded that

> the evidence presented clearly and convincingly establishes that the assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of ten years, systematically and intentionally assessed the petitioners' real estate, and consequently levied taxes against petitioners' real estate, at a weighted rate per acre of from 5,672.56 to 6,511.06 percent in excess of the weighted rate per acre assessment applied to comparable real estate owned by others and located adjacent, contiguous or near that of petitioners. [App. 40a.]

The Circuit Court found that the average assessed value for representative property owned by East Kentucky Energy in 1984 was $2,043 per acre. The average assessed value for certain property owned by others in Webster County that was comparable "in topography, location, access, development, mineral content and forestation" was $62.15, based on one list of comparable property, and $58.31, based on another. App. 16a, 21a-25a. Thus, for 1984 alone, the average assessed value of East Kentucky Energy's property was some *33 times* the average assessed value of comparable property owned by others—property that should have had roughly the *same* assessed value.

The Circuit Court found a similar disparity when it considered the assessment of property owned by Oneida-Shamrock. Oneida's property was assessed at $376.95 per acre. Four comparable coal properties that the Circuit Court found to be "generally indicative of the assessment of Webster County coal tracts during the period in question" were assessed at $21.99, $48.55, $19.21, and

$22 per acre. App. 54a, 60a-61a. The Oneida-Shamrock property was thus assessed at from *eight to twenty times* the assessed value of comparable property.

The Circuit Court noted that the assessed value of petitioners' property was also dramatically higher than the values recommended by the State Tax Commissioner. That official has responsibility under West Virginia law for appraising all property in the State, and his appraisal is to serve as a guideline for the county assessors.[3] The Tax Commissioner fixed the value of Webster County coal property at $360 per acre, yielding an assessed value of $180 per acre. App. 46a. The Circuit Court found that the assessor totally ignored these figures in arriving at petitioners' assessments, which were of an entirely different order of magnitude. The court found that after the assessor received the Tax Commissioner's appraisal, "it was placed in a drawer where it remained unused and abandoned until the day of the hearing." App. 34a, 66a.

The Circuit Court specifically found that the disparity between the assessment of petitioners' property and that of comparable property owned by others could *not* be traced to any distinguishing characteristics or unique features of petitioners' property.

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the real estate listed in the Exhibit B or G comparables. [App. 29a; *see* App. 59a.]

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[3] *See* W. Va. Code 18-9A-11; *see also* App. 34a-35a, 66a-67a.

No distinguishing characteristics could explain the disparity in assessments because "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. 29a, 59a. On the contrary, "[t]he sole basis for the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." App. 29a, 59a.

There was, the Circuit Court found, nothing inherently wrong in using recent sales as the basis for assessing real estate. If the assessor elected to rely upon this measure of value, however, he could not rely upon it only for property actually subject to sale.

> [I]f the assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal and uniform clause of Section 1, Article X, of the West Virginia Constitution to base the real estate assessments of substantially similar real estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables, even though the real estate has not been the subject of a recent conveyance. [App. 42a, 74a.]

The court found that "by intentionally and systematically failing to either equalize assessments by increasing the assessed value of substantially similar property to the level of petitioners' assessments, or to equalize assessments by lowering petitioners' assessments to the level at which comparable real estate was being assessed," the assessor and the Board had violated both the State and Federal Constitutions. App. 42a-43a, 74a.

In concluding that the assessor's practice contravened the Equal Protection Clause, the Circuit Court considered and rejected the assessor's suggestion that "over a

period of time equalization would be accomplished through periodic increases in the assessment of property which had not recently changed hands." App. 27a, 58a. Between 1975 and 1984 the average assessment of the properties found to be comparable to East Kentucky Energy's property increased $3.86 per acre annually for one list of comparable properties and $3.37 per acre annually for the other list of comparable properties. App. 27a-28a. The Circuit Court noted that if the same rate of increase were maintained for the comparable properties—even if the assessment of East Kentucky Energy's property remained the same—it would take *over 500 years* for the assessment of the comparable properties to reach that of East Kentucky Energy's property. App. 28a. A similar "incredible period of years would be required for equalization with [Oneida's] present assessment." App. 58a. And if the same rates of increase were applied to petitioners' property in the future, "equalization would, of course, never be accomplished. In fact, the difference between the assessments would become greater, not less." App. 28a, 58a.

The Circuit Court chose the remedy of lowering petitioners' assessments to the levels recommended by the State Tax Commissioner. Where the assessor and Board had assessed East Kentucky Energy's property at $15 million, the Circuit Court held that a nondiscriminatory assessment would be $1.7 million—a difference of $13.3 million. *See* App. 46a. Where the assessor and Board had assessed Oneida's property at $3 million, the Circuit Court held that a nondiscriminatory assessment would be $1.68 million—a difference of $1.32 million. *See* App. 78a. The court acknowledged that it had the authority "to order the assessor to equalize assessments by increasing the assessment of comparable properties to the level at which petitioners' property is assessed." It chose instead, however, to lower petitioners' assessments in order to avoid the severe impact on other owners that would

be caused by raising their assessments to petitioners' level. App. 43a-46a, 75a-78a.

The severity of that impact once again highlighted the discrimination against petitioners. For example, the court noted that assessing certain comparable parcels of property owned by others at the level at which Oneida's property was assessed would necessitate the following increases totalling nearly $14 million for only 7 parcels:

Current assessment of comparable parcels	Assessment if comparables assessed at Oneida's level
$ 35,310.00	$ 605,147.99
65,180.60	1,015,126.30
211,689.38	3,630,405.40
28,622.00	490,411.95
1,197,446.40	5,274,333.40
28,066.03	444,329.81
317,110.00	4,132,461.30

[Source: App. 61a-62a.]

The County Commission appealed the Circuit Court orders to the Supreme Court of Appeals, and the various cases were consolidated for purposes of appeal. On July 17, 1987, the Supreme Court issued a per curiam opinion reversing the Circuit Court and ordering reinstatement of the assessments previously set by the County Commission. The Supreme Court concluded that the consideration recited in petitioners' deeds reflected the true and actual value of petitioners' property, that any undervaluation of other property in Webster County was not "intentional and systematic," and that petitioners' only remedy was to seek to raise the assessments of all other property, rather than to lower that of their own. App. 7a-9a.

The court below reasoned that there was no discrimination against petitioners because the assessment of their

property was based on the true and actual value of that property:

> We find that the record does not support the trial court's ruling that the actions of the assessor and board of review constitute "intentional and systematic" discrimination. The assessments based upon the price paid for the property in arms' length transactions are an appropriate measure of the "true and actual value" of [petitioners'] property. [App. 8a.]

The court concluded that so long as a taxpayer's property is assessed on the basis of market value, the taxpayer cannot have his assessment lowered because of overassessment in relation to other taxpayers. Instead, the taxpayer " 'should seek to have the assessments of other taxpayers raised to market value.' " App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 709 (W. Va. 1982)).

Justice Brotherton, joined by Justice Neely, dissented.[4] The dissenters concluded that "the tail is now wagging the dog in West Virginia property taxation." App. 10a. They had no objection to relying on recent purchase prices to ascertain the value of property, but argued that "the quest for true value" could not be limited to certain parcels, and could not

> override the *constitutional* requirement that taxation be equal and uniform. There is neither equality nor uniformity when recent purchasers of property must pay tax based on current value while all other property owners pay tax based on low, outdated assessed values. [App. 10a (emphasis in original).]

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[4] The judgment entered by the court indicated that Chief Justice McGraw and Justices Neely, Miller, and McHugh concurred in the disposition, and that "Justice Brotherton dissents and would affirm the trial judge." App. 13a. A timely petition for rehearing was filed on August 13, 1987. On September 18, 1987, Justice Brotherton filed a dissenting opinion. Despite the indication on the previous judgment, Justice Brotherton was now joined in dissent by Justice Neely. App. 11a.

The dissent "recognize[d] the need for improving the educational system in West Virginia," [5] but argued that "this improvement cannot constitutionally be achieved at the expense of a few taxpayers." App. 10a.

There is no question that the judgment of the West Virginia Supreme Court of Appeals necessarily decided the Federal questions presented by petitioners. The Circuit Court concluded that the discriminatory assessments of petitioners' property violated both the West Virginia Constitution and the Equal Protection Clause of the United States Constitution. App. 43a, 74a ("the assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution"). The West Virginia Supreme Court's reversal of the Circuit Court necessarily entailed a reversal of that court's holding based on the Fourteenth Amendment. Indeed, the Supreme Court opinion itself recognized that petitioners "argue that the primary issue presented by this case is whether the assessments of their property and comparable properties are equal and uniform under the United States and West Virginia Constitutions." App. 5a.

REASONS FOR GRANTING THE WRIT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation, but no amount of deference or accommodation for questions of judgment can overlook the nature of the discrimination in this case or its startling magnitude. As the Circuit Court concluded with respect to East Kentucky Energy, respondent levied taxes against that company's

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[5] The property taxes are used primarily for funding the public schools. *See* Farber, *Limitations on Property Taxation in West Virginia: A Method Through the Madness*, 4 W.Va. Pub. Interest L. Rep. 1, 10 (1982).

property at a rate "from 5,672.56 to 6,511.06 percent in excess" of the rate applied to property owned by others and found to be comparable in every pertinent respect. App. 40a. Such disparity did not result from errors in judgment or the exercise of discretion. It resulted from a discriminatory plan. The sheer magnitude of the discrimination sanctioned by the court below should prompt review by this Court.

But more is at stake here than a palpably unjust result. As might readily be supposed, the court below was compelled to depart from legal principles established by this Court before it could conclude that the dramatic disparities in taxation found by the Circuit Court were fully consistent with the Fourteenth Amendment guarantee of equal protection. The court below ruled that petitioners were not subject to intentional and systematic discrimination because their property was not assessed at more than its actual value and they were free under state law to seek to *raise* the assessments of any relatively undervalued properties owned by others. App. 7a-9a.

This Court has clearly held, however, that the fact that a given taxpayer's property is assessed at its actual value is no defense to an equal protection challenge to the lower assessment of comparable property, and that a taxpayer who is subject to such discriminatory assessment cannot be relegated to attempting to raise the assessments of comparable properties owned by other taxpayers. *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923). This Court has also held that disparate taxation is "intentional and systematic"—and thus in violation of the Fourteenth Amendment—when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumber-*

land Coal Co. v. *Board of Revision*, 284 U.S. 23, 25 (1931). Here, there is no dispute that the disparate assessments were caused by the assessor's deliberate policy of reassessing recently purchased property at the purchase price, and not reassessing unsold comparable property.

This case turns on legal principles; there is no dispute about the facts. All of the facts pertinent to this Petition were findings by the Circuit Court, undisturbed on appeal. Most of them were stipulated to below by the parties. *See* App. 18a. And, in light of these undisputed facts, the significance of the principles is starkly presented. If we were to pose a hypothetical in which taxpayers A and B owned properties comparable in every way, but A was taxed at ten times the level of B, the Court would assume that the hypothetical was exaggerated in order to present the legal issue clearly. Yet the discrimination in the hypothetical pales before the facts of this case; the legal issues are clearly presented on these undisputed facts; and the legal issues obviously have broad significance.

Thousands of state and local jurisdictions impose *ad valorem* property taxes, and challenges alleging discrimination in the levying of such taxes arise with considerable frequency. Some time ago this Court, confronted with numerous such challenges, established the basic principles governing the disposition of these cases. Key among these: discrimination caused by a deliberately adopted system—rather than mere errors of judgment—violates the Fourteenth Amendment, property owners assessed on the full value of their property are nonetheless discriminated against when others are taxed on less than the full value, and such taxpayers are entitled to have their assessments lowered to the prevailing level and cannot be relegated to having the assessments of all other property owners raised. If the decision below is permitted to stand, these principles will be cast into doubt,

with resulting confusion concerning the relation between Federal constitutional rights and state tax practices.

I. The Court Below, By Ignoring This Court's Precedents, Sanctioned Intentional And Systematic Discriminatory Taxation

This Court has long recognized that "the equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U.S. at 623. Discriminatory treatment can inhere not only in disparate rates of taxation, but also in the disparate assessment of comparable property subject to the same tax rate. Given two comparable parcels of property assessed at $1,000, taxing one at 5 percent, for a tax of $50, and the other at 10 percent, for a tax of $100, would clearly contravene the constitutional guarantee of equal treatment. The same result obtains, both as a practical and a constitutional matter, if a uniform 10 percent rate is applied to both parcels, but one is assessed for tax purposes at $500, yielding a tax of $50, while the other—comparable in every pertinent respect—is assessed at $1,000, yielding a tax of $100. As Justice Brandeis noted for the Court in *Southern Railway Co.* v. *Watts*, 260 U.S. 519, 526 (1923), "[t]he rule is well settled that a taxpayer, although assessed at not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others."

As the holding just quoted demonstrates, unequal taxation of property is not immunized from constitutional scrutiny simply because the property of the disfavored taxpayer is "assessed at not more than full value." The court below emphasized that the price paid by petitioners for their property was an appropriate measure of the property's value, App. 7a, and petitioners do not dispute

that assertion here. The fact that petitioners' property may be assessed on the basis of its actual value, however, is completely irrelevant in considering an equal protection challenge. The point is that comparable property owned by others is *not* assessed on the basis of *its* actual value, but at a far lower level. As the dissenting justices pointed out below, "the quest for true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." App. 10a (emphasis in original).

This Court has frequently reiterated that the Equal Protection Clause protects taxpayers from discriminatory property taxation, even if they themselves are not assessed on more than the actual value of their property.[6] This proposition would seem self-evident from the very nature of the equal protection guarantee, which is concerned not with the substantive terms on which a State taxes but simply that the State not discriminate among similarly situated taxpayers. Indeed, the logic of the court below would find no equal protection violation if a State chose to impose a property tax on only one taxpayer, so long as the tax were not based on more than the actual value of that unfortunate taxpayer's property.

Courts properly accord considerable deference to valuation decisions, in light of the often complex questions of judgment that surround any effort to ascertain value, and respondent and the court below relied heavily on this

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[6] *See, e.g., Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 445-446; *Iowa—Des Moines National Bank* v. *Bennett*, *supra*; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-353 (1918); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1917); *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933). *See also* Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374, 1375 (1962) ("the Court repeatedly has held that discrimination between parcels within the same class may indeed constitute a denial of equal protection. This requirement of intraclass equality will prevail in any conflict with a state's provision for full-value assessment").

principle of deference. But deference to the judgment of the assessor is simply not at issue in this case. Petitioners are not suggesting that this Court or any other set itself up as a board of review to second-guess the judgment of assessors concerning the value of particular parcels of property. The dramatic disparity in valuation established as a matter of record here resulted not from any exercise of judgment or discretion by the assessor, but precisely because the assessor deliberately elected *not* to exercise *any* judgment or discretion.

The findings of the Circuit Court—undisturbed by the Supreme Court of Appeals—are quite explicit on this point. The Circuit Court found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. 29a, 59a. The disparity in assessments was in fact not based on any arguable differences among the parcels, and the assessor did not contend that it was. App. 30a, 59a.

> The assessor admitted on examination that she did not, in making her appraisement, physically inspect or view the petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed, by her or at her request or direction, and that appraisements had not been sought or considered * * *. [App. 30a, 59a.]

This is thus emphatically not a case in which any question of deference to the judgment of the assessor is involved.[7]

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[7] Nor is it a case involving any question of the reasonableness of state classifications. There is no issue in this case of different assessment rates or valuation procedures based on any classification of property under state law. *See Weissinger v. Boswell*, 330 F. Supp. 615, 622 (M.D. Ala. 1971) (three-judge court); *Louisville & Nashville R. Co.* v. *Public Service Comm'n*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968).

This Court has held that discrimination in state taxation does not contravene the Fourteenth Amendment unless it is "intentional and systematic." *Southern Railway Co.* v. *Watts*, 260 U.S. at 526. The purpose of the "intentional and systematic" test is to avoid intrusion into state tax practices on the basis of disparities that are occasional and sporadic, or the result of mere errors in judgment.

The decision of three of the five justices below was based on a misunderstanding of what the "intentional and systematic" test requires. It does not require proof that the taxing authorities were actuated by evil motives, or that they deliberately manipulated the data. This Court made that clear in *Cumberland Coal Co.* v. *Board of Revision*, *supra*. There the Court concluded that a tax assessor's policy of arriving at a single valuation figure for all coal property in the jurisdiction constituted intentional and systematic discrimination in violation of the Fourteenth Amendment:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [284 U.S. at 25 (citations omitted).[8]]

So too here there is no question that the challenged assessments were made "pursuant to a deliberately adopted

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[8] As one state Supreme Court put it, there is systematic discrimination whenever each appraisal is not "part of a systematic and definite plan which provides that all similar properties be valued in a like manner." *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. 609, 592 P.2d 965, 969 (1978). Even regularly *excusing* from taxation all taxpayers except a particular one constitutes systematic discrimination for purposes of the Fourteenth Amendment. *See Gosnell Development Corp.* v. *Arizona Dept. of Revenue*, 744 P.2d 451, 453-454 (Ariz. App. 1987).

system." It is undisputed that the assessor, adhering to the "welcome stranger" approach, valued recently-conveyed property at the value declared in the deeds, without raising the assessment of comparable property to that level. Even the three majority justices acknowledged that this was "the policy of the assessor's office during the relevant time period" and that "this method was uniformly followed." App. 6a. Again, as in *Cumberland Coal*, this is not a case of "mere errors in judgment"; the policy adopted by the assessor substituted for any exercise of judgment.

Other state courts of last resort have held that disparities in valuation caused by policies such as that adopted by the assessor in this case constitute unlawful taxation. For example, in *Duval* v. *City of Manchester*, 286 A.2d 612 (N.H. 1971), the Supreme Court of New Hampshire considered a case distinguishable from the present one only in that the disparity in valuation is so much greater here. In *Duval*, the assessor—like the assessor here—"adopted a procedure of reassessing parcels of property which were sold during the preceding year." *Id.* at 613. The result was that, as here, "the plaintiffs were required under their reassessment to pay taxes which were in fact disproportionately higher in relation to the true value of their properties than was the case as to other property owners in the city." *Id.* Unlike the court below, the *Duval* court concluded that when "plaintiffs' property was reappraised merely because it had been sold"—with the resulting disparities in valuation compared to unsold property—"the plaintiffs have met their burden." *Id.*

Board of Assessors of Weymouth v. *Curtis*, 375 Mass. 493, 378 N.E.2d 655 (1978), considered a similar problem. In *Curtis*, property was valued for tax purposes in 1968, and thereafter a particular parcel was revalued only if improvements were made to that parcel. *Id.* at 657. This "welcome improver" doctrine is indistinguish-

able, for purposes of the intentional and systematic test, from the "welcome stranger" doctrine at issue here and in *Duval*. The court in *Curtis* held that, in light of the disparities in valuation caused by this assessing practice, the taxpayers had carried their burden of establishing illegal discrimination:

> While the practice of not revaluing individual properties after the 1968 revaluation, unless improvements were made, may be an acceptable method of maintaining a fair assessment balance between unimproved properties, it is certainly prejudicial to those properties, like the parcels in question in the instant cases, that for one reason or another are reassessed after 1968 at figures equal to their full value as of the time of assessment. [*Id.* at 660.]

These cases and others demonstrate that when disparities in state taxation result from a particular assessment approach or policy—here, the "welcome stranger" approach —as opposed to the exercise of the assessor's judgment in appraising particular parcels, the "intentional and systematic" test is met. The point was clearly made in the leading case of *Sparks* v. *McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958). The assessor applied a new formula to determine the value of property on certain streets, which resulted in increases in assessments of from 300 to 1600 percent, while simply carrying forward the assessments of other comparable property. The state Supreme Court found that the increased assessments "were made intentionally and systematically" and were disproportionately excessive, and accordingly held that they were "illegal assessments because of their discriminatory character." *Id.* at 296-297. As the court concluded:

> There is no necessity of proving actual fraud. There is no indication of any dishonest motives on the part of any of these officials. We are satisfied that there were none but if the result of these intentional acts is discrimination the assessments cannot stand ir-

> respective of honest motives. * * * Nor is it a question of mere misjudgment of the assessing officials as to values; it is a question of an intentional overassessment of a portion of a certain class of property in specified areas as compared with assessment of like property in the rest of the county. [*Id.* at 297.]

Many cases have found unlawful discrimination in property tax assessments when reappraisals reach only a segment of property owners, even if all owners will eventually be subject to reappraisal. The assessor in *Sparks*, for example, asserted that he would, eventually, apply the new formula to all property. The court held that that fact could not save the unconstitutional discrimination:

> We cannot subscribe to the proposition that grossly unequal values by the use of a specified method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties. [327 P.2d at 297.]

In *Ernest W. Hahn, Inc.* v. *County Assessor*, *supra*, the court rejected a similar claim, noting that at his current pace it would take the assessor 50 to 100 years to reappraise all property in the jurisdiction, and that any "cyclical program of revaluation * * * must be completed within a reasonably limited time." 592 P.2d at 968-969.

The present case, of course, is far worse. Here only a small segment of property—that which has recently been sold—is subject to reappraisal, without any plan to subject all property to eventual reappraisal. What is at issue here is not a cyclical reappraisal program but a Ponzi scheme, in which existing landholders are heavily subsidized on the tax rolls by new entrants. Equalization is not simply "an indefinite number of years in the

future"—itself sufficient to establish a constitutional violation—but in fact can *never* occur.[9]

II. The Holding Below That The Only Remedy Is To Raise The Assessments Of Other Taxpayers Directly Conflicts With Numerous Decisions Of This Court

The court below held that petitioners could not seek to have their assessments lowered to prevailing levels but must instead cure any unconstitutional discrimination by attempting to have the assessments of all other taxpayers raised. Quoting from a recent decision of its own, the court concluded that " 'taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value.* Instead, they should seek to have the assessments of other taxpayers raised to market value.' " [10]

This holding was critical to the court's ultimate disposition of petitioners' claim. The court's conclusion that petitioners were not subject to unconstitutional discrimination was based on the fact that their property was not assessed at greater than true market value, *and* the court's view that any inequality due to assessment of other property at lower than true market value could be cured by raising the assessment of the other property. App. 8a-9a.

This latter holding—on which the ultimate disposition depends—directly conflicts with several decisions of this Court, which first addressed the issue at length in *Sioux*

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[9] Indeed, as the Circuit Court noted, even if the assessments of petitioners' property were frozen, it would take *over 500 years* for the *de minimis* increases in the assessments of other comparable property to catch up with petitioners' present assessments. App. 28a; *see* App. 58a.

[10] App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E. 2d at 709) (emphasis in decision below).

City Bridge Co. v. *Dakota County*, *supra*. In that case county assessors assessed a company's property at 100 percent of its true value, while assessing all other property at 55 percent. The Nebraska Supreme Court, like the court below in this case, held that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." 105 Neb. 843, 848. This Court unanimously reversed. Chief Justice Taft, writing for the Court, concluded that the result reached by the Nebraska Supreme Court would effectively deny the injured taxpayer any remedy at all.

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. [260 U.S. at 446.]

This Court has adhered to this view, without so much as a solitary dissent, ever since. In *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, for example, the Court reversed a decision by the Iowa Supreme Court that a taxpayer who was discriminated against must proceed under state law to raise the taxes of those who were unfairly favored. Justice Brandeis, writing for a unanimous Court, emphasized that

> it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have

> paid. * * * Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. [284 U.S. at 247.]

Again, in *Hillsborough* v. *Cromwell*, *supra*, a unanimous Court recognized that the Fourteenth Amendment protects taxpayers from discriminatory state taxation, and held that a state remedy that restricted the complaining taxpayer to proceedings to raise the taxes of others "is not adequate to protect [the taxpayer's] rights under the federal Constitution." 326 U.S. at 624. The Court acknowledged that the right at issue was the right to equal treatment, and that the taxpayer could not object if equality were achieved by raising the taxes of others rather than lowering his own. "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Id.* at 623 (citing cases).[11]

Many courts have understood and applied this Court's rulings and struck down discriminatory state tax practices. For example, in *Louisville & Nashville R. Co.* v. *Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), the court found intentional and systematic discrimination in violation of the Fourteenth Amendment when the complainant was taxed on the basis of 100 percent of the actual value of its property, while other taxpayers were taxed on a median basis of 63 percent of actual value.[12] The court specifically held that, under *Hillsborough* v. *Cromwell*, the tax-

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[11] Although petitioners relied heavily upon these precedents in arguments before the West Virginia Supreme Court of Appeals, that court did not distinguish this Court's decisions, or even cite them.

[12] The successful complainant's property in *Louisville & Nashville R. Co.* was thus assessed at a level some 50 percent higher than that of other taxpayers, compared to the 6,500 percent figure in this case. App. 40a.

payer could not be relegated to attempting to raise the assessments of other taxpayers. 631 F.2d at 432. Again, in *Weissinger* v. *Boswell*, *supra*, the three-judge District Court found a violation of the Fourteenth Amendment when the complainants' property was taxed at 30 percent of its actual value, while other taxpayers' property was taxed at a median 17 percent of actual value. As the court concluded, "this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of [the assessors] to perform their duties in accordance with state law." 330 F. Supp. at 622 (footnote omitted).

Many state courts have also correctly applied this Court's precedents.[13] To cite a very recent example, the Missouri Supreme Court held that assessing one taxpayer's property at 33⅓ percent of its value, compared to an average for comparable property of 20.9 percent, violated the Fourteenth Amendment guarantee of equal protection. *Savage* v. *State Tax Comm'n*, 722 S.W.2d 72 (1986) (en banc). The court concluded that "[s]uch a disparity is so grossly excessive as to be entirely inconsistent with an honest exercise of judgment and has the effect of intentional discrimination." *Id.* at 79.[14]

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[13] *E.g.*, *Boothe Fin. Corp.* v. *Lindley*, 6 Ohio St. 3d 247, 452 N.E.2d 1295, 1297-98 (1983), *cert. denied*, 464 U.S. 1057 (1984); *State ex rel. Douglas* v. *State Bd. of Equalization & Assessment*, 205 Neb. 130, 286 N.W.2d 729, 731-733 (1979); *District of Columbia* v. *Green*, 310 A.2d 848, 857 (D.C. App. 1973); *Southern Bell Tel. & Tel. Co.* v. *County of Dade*, 275 So. 2d 4 (Fla. 1973) (taxpayer constitutionally entitled to recover overpayments where its assessment level demonstrated in study to be above median level of others). In a decision post-dating the one below, the Supreme Court of Wyoming struck down as unconstitutional under the state constitution varying property tax assessment ratios, using principles the court said were equally applicable to the Fourteenth Amendment. *Rocky Mountain Oil & Gas Ass'n* v. *State Bd. of Equalization*, No. 87-194 (Dec. 31, 1987).

[14] The disparity found by the Circuit Court in the present case is more than *thirty times* the disparity found by the *Savage* court to be "grossly excessive." *See* App. 40a.

There is still, however, apparently some confusion over a number of the principles enunciated by this Court. The Maryland courts, for example, have taken the position that if a taxpayer is overtaxed, his only remedy is to force the authorities to raise the taxes of others similarly situated.[15] And in a Kansas case, as pointed out in the opinion dissenting in part, the majority thought that reducing the applicant's taxes would be unfair to those other taxpayers who had been assessed at the same rate.[16] A New Jersey intermediate court has ruled that a taxpayer can sue based either on its own overassessment or to correct the underassessment of other taxpayers, *Atrium Development Corp.* v. *Continental Plaza Corp.*, 214 N.J. Super. 639, 520 A.2d 827, 828 (1987), but the state Supreme Court has granted review of that decision. 107 N.J. 167, 526 A.2d 222 (1987). The Tennessee Supreme Court, like the court below, apparently restricts taxpayers who are relatively overassessed to actions to raise the assessments of other taxpayers. *See, e.g., Biltmore Hotel Court* v. *City of Berry Hill*, 216 Tenn. 62, 390 S.W.2d 223 (1965).

The instant case presents an ideal vehicle for the Court to clarify its rulings and to reaffirm the principles repudiated by the court below.

III. The Questions Presented Are Important And Recurring, And Need To Be Resolved

State and local governments throughout the country are heavily dependent upon the revenue they gain from

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[15] *See Borden* v. *Director, State Dept. of Assessments and Taxation*, 19 Md. App. 112, 309 A.2d 773, 778-779 (1973) (discussing cases), *cert. denied*, 416 U.S. 940 (1974); *Samet* v. *Supervisor of Assessments*, 290 Md. 357, 430 A.2d 73, 75-76 (1981) (purporting to rely on this Court's decisions in *Sunday Lake Iron Co., supra*, and *Sioux City Bridge, supra*).

[16] *Northern Nat. Gas Co.* v. *Williams*, 208 Kan. 407, 493 P.2d 568, 589-590, *cert. denied and app. dism'd*, 406 U.S. 964, 967 (1972).

property taxes. In 1985, state and local governments collected some $104 billion in property taxes, more than twice the amount collected a decade before. Property taxes account for 74 percent of all revenue for local governments.[17] With cutbacks in federal assistance, property taxes will play an even greater role as sources of revenue for state and local government in the years ahead.[18]

At the same time, the burden of property taxes on landowners has also risen. From 1970 to 1984, property taxes have increased, on a per capita basis, more than 240 percent.[19] The result has been several well-publicized "tax revolts," and practical as well as formal limitations on the authority of state and local officials to raise tax rates.[20]

State and local governments thus find themselves confronted with a dilemma: they need sources of new revenue in an era of economic readjustment, but cannot readily increase the tax burden on existing taxpayers. The decision below, if permitted to stand, offers the alluring shortcut out of this quandary of taxing newcomers to the jurisdiction at much higher levels than existing landowners. This "welcome stranger" approach yields increased revenue without raising taxes on existing landowners, the "friends and neighbors" of the taxing officials. App. 40a, 72a.

This is a "shortcut," however, around the Fourteenth Amendment guarantee of equal protection. Neither hardship on the State from having to give up taxes not truly owed by the taxpayer nor hardship on other taxpayers

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[17] *Tax Features*, vol. 31, no. 6, at 2 (Tax Foundation, Sept. 1987).

[18] *See* Farber, *supra*, 4 W. Va. Pub. Interest L. Rep. at 12.

[19] Census Bureau, *Statistical Abstract of the United States 1987* at 258.

[20] *See* Lowery, *After the Tax Revolt: Some Positive, If Unintended, Consequences*, 67 Soc. Sci. Q. 736 (1986).

from having to pay taxes required to equalize disparate treatment [21] can relieve the State of its obligations to take appropriate action to eliminate discrimination. The court below upheld the dramatic disparity in taxation clearly shown by the record in this case only by ignoring this Court's holdings that taxpayers assessed at full value suffer unconstitutional discrimination when other taxpayers are assessed at less than full value, that such discrimination is "intentional and systematic" when it results from a deliberately adopted assessment system, such as the "welcome stranger" approach, and that a taxpayer who is overassessed cannot be forced to raise the assessments of all other taxpayers to obtain relief.

Here, there is a highly-developed and undisputed record setting forth the disparities in valuation. The record also clearly establishes that the sole basis for the disparities is the "welcome stranger" approach; the Circuit Court found that there were no differences between the properties that could explain the startling disparities. The legal questions are thus presented in stark relief and require reversal.

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[21] *See Gosnell Development Corp.* v. *Arizona Dept. of Revenue*, 744 P.2d at 452.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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